are uniformly expressive of a State's policy,[20] and as such purely intraterritorial in scope and effect, it may be argued not only that this policy is not contravened by the enforcement of a contract performable elsewhere, but also that such legislation could not in its nature have been directed against non-residents having performance without the jurisdiction in view.[21] It would seem that in such event, although the contract becomes complete within the jurisdiction, its laws would be operative to no greater degree than where a married woman under a disability affixes her signature to a contract which awaits completion in a state where her capacity is recognized.[22] Where therefore a contract is performable without the jurisdiction of the place of contracting, by the laws of which a party thereto is incapacitated, the courts may properly disregard the force of those laws, it would seem,[23] and apply the law of the place of performance, for the purpose of upholding the contract, provided there be capacity by the domiciliary law,[24] and if the place of performance be the forum, no violation of its policy.[25]

This situation was presented to a New York court in the recent case of *Hammerstein* v. *Sylva* (1910) 124 N. Y. Supp. 535, where the parties made a contract in France performable in New York where they were domiciled. One of the parties although capable by New York law, was (it was assumed for the purposes of the decision) incapable by French law. The court held, that since the validity of a contract was governed by the law of the place of performance, capacity being conceived as included within the validity, and since the defendant was capable both by the law of the domicile and of the place of performance, the defendant was liable. Although exception must be taken to the reasoning of the court prompting the adoption of the law of the place of performance as determinative of contractual capacity, as well as to its enunciation of the vitality of the domiciliary law, the result commends itself as a modification of the American rule, consistent with its purpose.

EFFECT OF DEFECTIVE INCORPORATION ON LIABILITY OF STOCKHOLDERS. —In the recent case of *Jennings* v. *Dark* (Ind. 1910) 92 N. E. 778, the Supreme Court of Indiana considered the status of stockholders of a defectively incorporated association and reached the conclusion that one who had dealt with the company as a corporation could not enforce the general liability of its members as partners. The decision rested in

[20]Milliken *v.* Pratt *supra;* International Harvester Co. *v.* McAdam *supra;* Armstrong etc. Co. *v.* Best *supra;* First Nat. Bank *v.* Shaw *supra;* Gates *v.* Bingham *supra.*

[21]This would not, however, countenance the designation of an extra-territorial place of performance for the mere purpose of evading the effect of local policy. Campbell *v.* Crampton *supra;* Hager *v.* Nat. etc. Bank *supra.*

[22]*Cf.* Voigt *v.* Brown (N. Y. 1886) 42 Hun. 394; Milliken *v.* Pratt *supra;* Phœnix etc. Ins. Co. *v.* Simons *supra.* See also note 19.

[23]See Story, Confl. of L. §§ 73, 102, 106; Voigt *v.* Brown *supra;* Union Nat. Bank *v.* Chapman *supra;* Hauck Clothing Co. *v.* Sharpe (1900) 83 Mo. App. 385.

[24]See note 18.

[25]*Cf.* Nichols & Shepard Co. *v.* Marshall (1899) 108 Ia. 518 and cases in note 21.

part upon the ground that, although there had been no attempt to incorporate under the existing law, yet, as there was a valid law under which the association might have been formed and as it actually exercised corporate powers in the belief that it had authority to do so by virtue of a prior act, the plaintiff was estopped to deny the fact of incorporation. It is not apparent, however, from the mere fact that the company had held itself out as a corporation and thereby induced the plaintiff to deal with it as such, that the defendant stockholders have so changed their position that a denial by the plaintiff of the corporateness of the association would work a fraud upon the defendants,[1] and the basis for an equitable estoppel would therefore seem to be non-existent.[2] It is true that the defendants themselves might be estopped to deny their incorporation,[3] but as there is no mutuality in an equitable estoppel,[4] this ground for the decision finds its only support in the argument that since the creation of a corporation results from an act of the sovereign power having the force of a record, both parties are estopped to deny the existence of a legal entity.[5] However applicable this theory might be to the case of an association called into existence by virtue of a special act of the legislature, it would seem to be of little force when members of a company are seeking to avoid individual liability by asserting incorporation under a general law.[6] The situation of the stockholders, apparently, is not essentially different from that of any person who claims an exemption from liability through compliance with a rule of the common law, and in neither case, unless exceptional facts are present, would the opposing party be estopped to deny the fact of compliance.

The conclusion that the members of a company which has irregularly assumed the powers and seeks the rights and privileges of a corporation, are not individually liable for debts contracted in the operation of the business, finds support, however, in the argument of the Indiana Court,[7] that, as the state alone is directly affected by the assumption of the rights peculiar to a legal entity, the corporateness of the association is not open to collateral attack but may be inquired into only at the instance of one whose rights have been invaded.[8]

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[1] See 6 COLUMBIA LAW REVIEW 8, 9.

[2] See Electric Light Co. *v.* Gas Co. (1897) 99 Tenn. 371; Edmonson *v.* Montague (1848) 14 Ala. 370.

[3] See Order of Mutual Aid *v.* Paine (1887) 122 Ill. 625; Empire Mfg. Co. *v.* Stuart (1881) 46 Mich. 482.

[4] 10 COLUMBIA LAW REVIEW 76 and cases there cited.

[5] See Horn *v.* Cole (1868) 51 N. H. 287.

[6] See Bigelow *v.* Gregory (1874) 73 Ill. 197; Kaiser *v.* Lawrence Sav. Bank (1881) 56 Ia. 104; *cf.* Bank *v.* Rockefeller (1905) 195 Mo. 15.

[7] Jennings *v.* Dark *supra.*

[8] See Owensboro Wagon Co. *v.* Bliss (1901) 132 Ala. 253; Duggan *v.* Colo. M. & I. Co. (1887) 11 Colo. 113.

This theory, however, has seldom been invoked successfully in favor of an association which exists without color of law. It is applied generally only to corporations *de facto,* for which three essential conditions must concur: there must be a valid law under which a corporation having the powers assumed might have been formed; there must have been a *bona fide* attempt at substantial compliance with the provisions of the statute; and there must have been an actual exercise of corporate powers in good faith. Doty *v.* Patterson (1900) 155 Ind. 60; Richards *v.* Minnesota Sav. Bank (1899) 75 Minn. 196; *cf.* The Journal Co. *v.* Nelson (1908) 133 Mo. App. 482.

This doctrine would seem to date its origin from the period when all corporations were public in character and were the product of royal charter or of special act of legislature.[9] It was therefore in accordance with the principles of the common law, that when the recipients of the privilege endeavored to conform to the charter and had actually entered upon a user of the powers thereby granted, the sovereign alone would be allowed to complain that this user was not entirely regular.[10]

Where there is a general law, however, the act by means of which incorporation may be effected is of a different nature.[11] The state permits a group of individuals who have conformed to the statutory requirements to act as a distinct entity with enumerated powers and with certain rights, privileges and immunities, among which is generally an exemption of the stockholder from individual liability for the corporate debts.[12] As compliance with the statute is the condition upon which this exemption is granted, there would seem to be no valid reason why a denial of the allegation of incorporation should not put in issue the fact of conformity to its provisions.[13] The members have undoubtedly entered upon a common enterprise with a view to profit and as, according to the better opinion, a specific intent to become partners is not necessary to the formation of a partnership,[14] such would appear to be their true relation if for any reason, the attempt to incorporate failed of fulfillment.[15] And as under the rules of the common law, members of an unincorporated joint-stock company were, in the absence of legislative enactment, individually liable for the debts incurred in the pursuit of the common business,[16] it would seem that where this liability is sought to be avoided by virtue of incorporation under a general law, the burden of proving compliance with the law should rest upon the party asserting it.[17] The contrary result

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[9]See Williston, The History of the Law of Business Corporations before 1800, 3 Select Essays 195.

[10]See Baldwin, History of the Law of Private Corporations in the Colonies and States, 3 Select Essays 236.

[11]See Morawetz, Private Corporations (2nd ed.) §§ 21-28.

[12]Cook, Corporations (6th ed.) §§ 212, 213.

[13]Abbott *v.* Omaha Smelting Co. (1876) 4 Neb. 416; Bigelow *v.* Gregory *supra;* Flagg *v.* Stowe (1874) 72 Ill. 397; *id.* (1877) 85 Ill. 164; *cf.* Harrill *v.* Davis (1909) 168 Fed. 187.

[14]National Bank of Watertown *v.* Landon (1871) 45 N. Y. 410; see Rowland *v.* Long (1876) 45 Md. 439.

[15]Forbes *v.* Whittemore (1896) 62 Ark. 229; Citizens Bank *v.* Hine (1841) 49 Conn. 236; Harrill *v.* Davis *supra;* Smith *v.* Warden (1885) 86 Mo. 382; see Shorb *v.* Beaudry (1880) 56 Cal. 446; Johnson *v.* Corser (1885) 34 Minn. 355; Coleman *v.* Coleman (1881) 78 Ind. 344; Mandeville *v.* Courtright (1905) 142 Fed. 97; but see Ward *v.* Brigham (1879) 127 Mass. 24; Rutherford *v.* Hill (1892) 22 Or. 218.

[16]Grady *v.* Robinson (1856) 28 Ala. 289; Sebastian *v.* Booneville Academy Co. (Ky. 1900) 56 S. W. 810.

[17]See cases cited in note 13 *supra.*

This on its face appears reasonable and just, notwithstanding the argument, Richards *v.* Minnesota Sav. Bank *supra;* and see Harrill *v.* Davis *supra,* that to hold the innocent members of an association in the management of which they have taken no active part, individually liable for the debts of the company, would be too unjust to warrant judicial approval; see Stafford Bank *v.* Palmer (1880) 47 Conn. 443; nor would such a conclusion require the court to write a new contract for the

reached in *Jennings* v. *Dark,* although in accord with the weight of authority,[18] would therefore appear to be erroneous upon principle, and the members of the association, it is submitted, should have been held liable upon the contract as general partners.

CREATION OF THE RELATION OF DEBTOR AND CREDITOR BETWEEN BANKER AND CUSTOMER.—The legal relations between banker and customer, though theoretically regulated entirely by contract, are, in the absence of express stipulation, determined by commercial usage in contemplation of which the parties are presumed to have dealt. The legal consequences of this complicated contract are, on the other hand, ascertained by the application of fundamental principles of agency and negotiable paper. While the numerical weight of authority has, in accordance with sound theory, deduced the rule that the liability of a bank receiving paper to be sent for collection to a distant point is dependent entirely upon the exercise of due care in the selection of a suitable correspondent,[1] a considerable number of courts have nevertheless established the contrary doctrine of absolute liability by interpolating into the contract a term discernible neither in commercial usage nor in the reasonably presumable intention of the parties. This doctrine, though originally founded on a supposed analogy to the liability of an independent contractor for the torts of his servant,[2] is now based on broad and persuasive considerations of public policy indicating that the recognition by law of this obligation, which is like that of a *del credere* factor, will best "promote the general welfare of the commercial community."[3]

The property rights in negotiable instruments transferred to a bank are, like the other incidents of the contract, derived primarily from the nature of the original transaction. If the checks or drafts are regarded by both parties as so much cash, the contract is one of deposit and title to the paper passes to the banker who, as in the case of a general deposit of cash, becomes forthwith the debtor of his customer.[4] If, however, the instrument is received for collection merely, title remains in the customer and the relation between him and the banker is that of principal and agent.[5] The mere fact that the collecting bank has credited the depositor with the amount of his

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parties, see however Hoyt *v.* McCallum (1902) 102 Ill. App. 287, but merely results from an application of the rules of law to the contract as written by them; nor is there involved a nullification of franchises. Francis M. Burdick, Are Defectively Incorporated Associations Partnerships? 6 COLUMBIA LAW REVIEW 1.

[18]Burdick, Partnership 45.

[1]Dorchester & M. Bank *v.* M. E. Bank (Mass. 1848) 1 Cush. 177; Guelich *v.* Nat. State Bank (1881) 56 Ia. 434; Daly *v.* Butchers' and Drovers' Bank (1874) 56 Mo. 94.

[2]Allen *v.* Merchants' Bank of New York (N. Y. 1839) 22 Wend. 215.

[3]Exchange Nat. Bank *v.* Third Nat. Bank (1884) 112 U. S. 276; Bailie *v.* Augusta Sav. Bank (1895) 95 Ga. 277; Davey *v.* Jones (N. J. 1880) 13 Vroom. 28; and see Morse, Banks and Banking (3rd ed.) §§ 272 *et seq.;* 1 Daniel, Neg. Instr. (4th ed.) § 342.

[4]First Nat. Bank *v.* Armstrong (1889) 39 Fed. 231.

[5]Commercial Bank *v.* Armstrong (1892) 148 U. S. 50; Evansville Bank *v.* Ger.-Amer. Bank (1894) 155 U. S. 556; Nat. Bank *v.* Seaboard Bank (1889) 114 N. Y. 28; Akin *v.* Jones (1894) 93 Tenn. 353.